



BILLING CODE 6560-50-P

**ENVIRONMENTAL PROTECTION AGENCY**

**[EPA-HQ-OPP-2018-0141; FRL-9975-59]**

**Chlorpyrifos, Diazinon, and Malathion; National Marine Fisheries Service Biological Opinion Issued Under the Endangered Species Act; Notice of Availability**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice.

**SUMMARY:** The Environmental Protection Agency (EPA) is seeking comment on the final Biological Opinion (BiOp) issued under the Endangered Species Act (ESA) by the National Marine Fisheries Service (NMFS), regarding the potential effects of chlorpyrifos, malathion, and diazinon on federally listed threatened or endangered species (listed species) and their designated critical habitats.

**DATES:** Comments must be received on or before *[INSERT DATE [60] DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]*.

**ADDRESSES:** Submit your comments, identified by docket identification (ID) number EPA-HQ-OPP-2018-0141, by one of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

- *Mail:* OPP Docket, Environmental Protection Agency Docket Center (EPA/DC), (28221T), 1200 Pennsylvania Ave., NW., Washington, DC 20460-0001.

- *Hand Delivery:* To make special arrangements for hand delivery or delivery of

boxed information, please follow the instructions at

<http://www.epa.gov/dockets/contacts.html>.

Additional instructions on commenting or visiting the docket, along with more information about dockets generally, is available at <http://www.epa.gov/dockets>.

**FOR FURTHER INFORMATION CONTACT:** Tracy Perry, Pesticide Re-Evaluation Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460-0001; telephone number: (703) 308-0128; email address: [Perry.Tracy@epa.gov](mailto:Perry.Tracy@epa.gov).

## **SUPPLEMENTARY INFORMATION:**

### **I. General Information**

#### *A. Does this Action Apply to Me?*

This action is directed to the public in general, and may be of interest to a wide range of stakeholders including environmental, farm worker, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides and/or the potential impacts of pesticide use on listed species and designated critical habitat. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action.

#### *B. What Should I Consider as I Prepare My Comments for EPA?*

1. *Submitting CBI.* Do not submit this information to EPA through [regulations.gov](http://www.regulations.gov) or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that

includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket.

Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When preparing and submitting your comments, see the commenting tips at <http://www.epa.gov/dockets/comments.html>.

*C. How Can I Get Copies of this Document and Other Related Information?*

A copy of the *Biological Opinion on Pesticides: Chlorpyrifos, Diazinon, and Malathion* is available in the docket under docket identification (ID) number EPA-HQ-OPP-2018-0141.

## **II. What Action is the Agency Taking?**

### *A. Authority*

The ESA requires Federal agencies, such as EPA, to ensure that their actions are not likely to jeopardize the continued existence of species listed as threatened or endangered under the ESA, or destroy or adversely modify the designated critical habitat of such species. The registration of a pesticide under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) constitutes an EPA "action" under the ESA. If EPA determines a pesticide may affect a listed species or its designated critical habitat, EPA must initiate consultation with the U.S. Fish and Wildlife Service (FWS) or NMFS (the Service or Services), as appropriate. In response to a Federal agency initiating formal consultation, the Service(s) develops a BiOp in which it provides its opinion on whether the "action" is likely to jeopardize the continued existence of a listed species and/or is likely to destroy or adversely modify designated critical habitat and, if so, describes reasonable and prudent alternatives (RPAs) to avoid the

determination. The BiOp will also address whether the action will result in incidental take of listed species and, if so, provide a statement specifying the amount of any permitted incidental take and setting forth reasonable and prudent measures (RPMs) necessary or appropriate to minimize the impact of such take.

### *B. Background*

Consistent with EPA's responsibility under the ESA, on January 18, 2017, EPA released national-level endangered species Biological Evaluations (BEs) for chlorpyrifos, diazinon, and malathion to assess risks to listed species from registered uses of these pesticides. These BEs were completed in accordance with the joint Interim Approaches developed to implement the recommendations of the April 2013 National Academy of Sciences (NAS) report, *Assessing Risks to Endangered and Threatened Species from Pesticides*. The NAS report outlined recommendations on specific scientific and technical issues related to the development of pesticide risk assessments that EPA and the FWS and NMFS must conduct to meet their obligations under the ESA. In November 2013, the Services, EPA, and the U.S. Department of Agriculture (USDA) released a white paper containing a summary of their joint Interim Approaches for assessing risks to listed species from pesticides. Details of the joint Interim Approaches are contained in the November 1, 2013 white paper *Interim Approaches for National-Level Pesticide Endangered Species Act Assessments Based on the Recommendations of the National Academy of Sciences April 2013 Report*. The methods developed as part of the joint Interim Approaches will continue to be vetted before EPA utilizes these methods broadly to meet its ESA obligations. Additional information on endangered species risk assessment and the NAS report recommendations are available at <https://www.epa.gov/endangered-species/implementing-nas-report->

*recommendations-ecological-risk-assessment-endangered-and.*

On December 29, 2017, in response to a court-ordered deadline in the case of *Nw. Coal. for Alternatives to Pesticides, et al. v. NMFS*, Stipulation and Order, Dkt. 50, No. 07-1791-RSL (D. Wash. May 21, 2014), NMFS transmitted to EPA its final BiOp regarding the effects of the registration review under section 3 of FIFRA of these pesticides on listed species. The BiOp addressed the effects of these three pesticides on 77 listed species and 50 designated critical habitats and, in sum, 38 different species would likely be jeopardized with extinction and 37 critical habitat units would be destroyed or adversely modified. NMFS had sought from the court, but was not provided, additional time to complete the BiOp. On January 8, 2018, EPA confirmed receipt of the BiOp and informed NMFS of EPA's intention to reinitiate informal consultation on the BiOp so that the consultation on the pesticides could be informed by (1) input from stakeholders, (2) further interagency discussion and agreement on the jeopardy determination interim methods, and (3) additional data and analysis, including consideration of the best scientific and commercial data available on use and usage information. On February 21, 2018, EPA sent NMFS a letter requesting informal consultation on the same action. EPA will use the information and analysis received and developed in the course of the informal consultation to inform whether formal reinitiation of consultation on the BiOp is appropriate.

### *C. Public Involvement Process*

As a result of the U.S. District Court Western District of Washington at Seattle's failure to extend NMFS's court-ordered deadline, NMFS issued the final BiOp without having received input from the public and applicants (pesticide registrants), which is at odds with EPA's 2013 public stakeholder process for ESA consultations – an open and transparent

process supported by the Services, EPA, and USDA. As explained in the 2013 public stakeholder document, stakeholder input is critical to the development and evaluation of any measures EPA may implement to address risks to listed species and designated critical habitat. Accordingly, EPA is seeking comment on the BiOp to receive stakeholder and public input prior to either reinitiating consultation on the BiOp or implementing the measures of BiOp. EPA will evaluate the input received in determining how it will proceed with respect to the final BiOp.

#### *D. Public Comments Sought*

The BiOp for chlorpyrifos, diazinon, and malathion is being included in the docket (EPA-HQ-OPP-2018-0141) to seek input on NMFS's jeopardy findings, RPMs and RPAs, and to solicit additional use and usage information. Specifically:

1. Comments on the scientific approaches and data sources used to support the BiOp and reach determinations for the listed species and critical habitat.
2. Comments on the RPAs and RPMs. Can they be reasonably implemented? If not, describe why not. Are there different measures that may provide equivalent protection to the ones in the BiOp but result in less impact to pesticide users?
3. Comments on national- and state-level use and usage data and information. In particular, EPA is seeking usage data and information for non-agricultural use sites (e.g., nurseries, managed forests, pasture, rights-of-way, golf courses, and wide-area mosquito control). If possible, provide sources of data and information that should be considered.

**Authority:** 7 U.S.C. 136 *et seq.*

Dated: March 15, 2018.

Yu-Ting Guilaran,  
*Director, Pesticide Re-Evaluation Division, Office of Pesticide Programs.*

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